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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 20

DEAN RUSK, SECRETARY OF STATE, APPELLANT

v.

JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANT

We treat, in this reply brief, only with the point that Section 360 of the Immigration and Nationality Act of 1952 was designed by Congress to provide the exclusive procedure for a person in appellee's position to test his claim to United States citizenship (Point I of our main brief, pp. 23 *et seq.*; Point I of Appellee's Brief, pp. 15–28; *Amicus* Brief for the American Civil Liberties Union; Point I of *Amicus* Brief for Angelika Schneider, pp. 6–12). The discussion in the opposing briefs of the Congressional background and history of Section 360, as well as certain assumptions in those arguments, makes appropriate a somewhat more detailed consideration of the statute and the relevant materials.

CONGRESS INTENDED SECTION 360 TO PROVIDE THE EXCLUSIVE PROCEDURE FOR A PERSON IN APPELLEE'S POSITION TO TEST HIS CITIZENSHIP CLAIM

In our view, the wording, structure, background, and history of Section 360 support the following interrelated propositions:

(i) Since the Nationality Act of 1940, Congress has dealt specifically, in its nationality legislation, with the problem of judicial testing of a denial of citizenship rights, and has provided a special exclusive statutory procedure to be used by the claimants—both residents and non-residents—in lieu of (and not in addition to) the general types of declaratory and injunctive relief which might otherwise be available under the general law; Section 360 is the special procedure, "occupying the field," which governs this case.

(ii) In enacting Section 360 as part of the 1952 Act, Congress was concerned with the too-free use of declaratory relief by non-resident claimants (not merely with their physical entry under the certificate-of-identity procedure of the 1940 Act) in order to obtain determinations of American citizenship; Congress desired to cure this defect by cutting off declaratory (and injunctive relief) for non-resident claimants and requiring them to pursue normal immigration procedures (including investigation by the Immigration and Naturalization Service, and judicial relief by way of habeas corpus); accordingly, it restricted declaratory relief to citizenship claimants who are within the United States.

We have, we believe, documented these propositions in our main brief. Here, we discuss them further in the light of the particular arguments presented by appellee and the *amici*.

A. SECTION 360 PROVIDES AN EXCLUSIVE SELF-CONTAINED PROCEDURE FOR CITIZENSHIP-CLAIMANTS.

1. THE TERMS AND STRUCTURE OF SECTION 360 SHOW THAT THE PROVISION IS SELF-CONTAINED AND THAT OTHER DECLARATORY AND INJUNCTIVE RELIEF IS PRECLUDED

The gist of the opposing argument is that Section 360 does not stand in the place of other declaratory and injunctive relief under the Declaratory Judgment and Administrative Procedure Acts, but merely provides an additional remedy to be used if the claimant desires. This position is perhaps most clearly refuted by the history and background of the section (Govt. Main Br. 24–43; *infra*, pp. 10–15), but we submit that the section's bare terms and structure also show that it was intended as a special, comprehensive, and exclusive procedure by which claimants to citizenship were to pursue their claims.

(*a*). The exclusiveness of the procedure is shown, first, by the fact that the section expressly covers the entire universe of citizenship-claimants—those "within the United States" (subsection (a)), and those "not within the United States" (subsections (b) and (c))—and each half of the section is complete in itself. Such an all-inclusive provision is not normally read as leaving gaps to be filled by application of the general law, or as having only partial coverage. Rather, the presumption is that the subject matter has been fully covered, explicitly and implicitly, within the confines of the provision.[1]

[1] Section 503 of the 1940 Act (Govt. Main Br. 5–6) likewise covered persons within and without the United States, and provided within itself a complete procedure for citizenship-claimants. See *infra*, pp. 7–9.

(*b*). Certainly, subsection (a) (Govt. Main Br. 3), covering "any person who is within the United States", cannot be interpreted as merely providing an additional remedy, supplementary to other declaratory (and comparable) remedies which continue to be available under the Declaratory Judgment and Administrative Procedure Acts. Subsection (a), in explicit terms, establishes an action for citizenship-claimants under the Declaratory Judgment Act (28 U.S.C. 2201) (to which it refers), and at the same time expressly prohibits such a suit where (a) the issue of nationality is or was connected with an exclusion proceeding, or (b) the administrative denial of citizenship rights occurred more than five years before institution of the action. If these specific limitations could be disregarded or avoided by the easy device of an "ordinary" declaratory action by the resident claimant, there would have been no purpose in enacting subsection (a), with its express limitations. Indeed, it is hard to see why Congress, if it shared appellee's view, did not simply leave the entire problem of declaratory relief to the general Declaratory Judgment Act without any special mention or provision in the 1952 Act.[3]

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[3] In *Frank* v. *Rogers*, 253 F. 2d 889 (C.A.D.C.), upon which appellee relies, the court of appeals held that an individual ordered deported, who brought a declaratory action in the District of Columbia to test the deportation order (see *Shaughnessy* v. *Pedreiro*, 349 U.S. 48), was not required by Section 360 to institute a *separate* action in the district of his residence in order to challenge the deportation order on the ground that he was a citizen, not an alien, but could raise that issue in the regular declaratory action challenging the order. This was

(*c*). Moreover, the face of Section 360 suggests strongly that Congress did not wish to extend declaratory relief (apart from possible declaratory relief incident to review of an exclusion order) to those individuals whose status as Americans was questioned during a period when they were abroad. Under subsection (a), declaratory relief cannot be obtained, even by a person within the United States, if the citizenship issue arose previously in connection with an exclusion proceeding or is currently an issue in such a proceeding. Subsections (b) and (c) carry forward the same concept by providing that persons not within the United States should challenge a denial of citizenship by seeking admission, and then testing their claim in exclusion proceedings. In short, Congress took pains to limit the declaratory relief it was providing to those (unlike appellee) whose nationality status is questioned while they are within this country. The others were to take the immigration route.[3]

(*d*). In the light of its terms and structure, Section 360 is properly characterized as establishing a special comprehensive statutory procedure, superseding the provisions of general law, for pursuing claims

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obviously an unusual situation in which no substantial purpose would be served by requiring the plaintiff to bring another suit in another forum, and unnecessary multiplicity of actions would be avoided by permitting the issue of nationality to be tried in the District of Columbia along with the other attacks upon the deportation order.

[3] The legislative history of Section 360 (Govt. Main Br. 30–37; *infra*, pp. 10–15) confirms that this was the Congressional purpose.

to citizenship. The Declaratory Judgment Act (28 U.S.C. 2201) as well as the general jurisdictional provisions for the District Court for the District of Columbia—which might be applicable in the absence of Section 360—were intended to give way to the specific requirements of that section.

As for the Administrative Procedure Act, Section 10(b) of that statute, 5 U.S.C. 1009, provides that "[t]he form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute"—thus envisaging precisely the type of statutory proceeding of which Section 360 is an example. There is full consonance with, rather than modification or supersession of, the Administrative Procedure Act, and therefore Section 12, 5 U.S.C. 1011 (Appellee's Br. 5), dealing with supersession by subsequent legislation, has no application. In any event, as this Court held with respect to other provisions of the Immigration and Nationality Act, in *Marcello* v. *Bonds*, 349 U.S. 302, 308, 310, the later Act's detailed coverage of the same subject matter dealt with generally in the Administrative Procedure Act shows that Congress was setting up a specialized procedure applicable to nationality claims, superseding any contrary provision of the earlier statute.[4]

[4] For both of these reasons—that Section 360 provides "special statutory review proceedings[s]" under Section 10(b) of the Administrative Procedure Act, and also that this specialized procedure supersedes the general provisions of Section 10 to the extent they are inconsistent—neither *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, nor *Brownell* v. *Tom We Shung*, 352 U.S. 180, is in point. Those cases held declara-

2. THE PREDECESSOR PROCEDURE ESTABLISHED BY SECTION 503 OF THE 1940 ACT WAS ALSO SELF-CONTAINED AND EXCLUSIVE

Section 360 of the 1952 Act stemmed from another self-contained provision of the nationality laws—Section 503 of the Nationality Act of 1940 (Govt. Main Br. 5–6). Appellee and the *amici* err in treating Section 503 as if it, too, merely supplemented the Declaratory Judgment Act and provided an additional remedy. Congress did not so view Section 503. On the contrary, that section established a special statutory procedure for declaratory relief in lieu of any other which might have in time developed under the Declaratory Judgment Act.

Prior to the 1940 Act, the existence of declaratory relief for a non-resident citizenship-claimant was, at best, very doubtful. The area was almost wholly unexplored. The Declaratory Judgment Act was itself only six years old. It was applied, in 1939, to a suit by a *resident* citizenship-claimant to establish her nationality (*Perkins* v. *Elg*, 307 U.S. 325), but up until that case reached this Court the government contended that the Declaratory Judgment Act could not be used even for that purpose (R. in Nos. 454–455, O. T. 1938, at pp. 27–28, 29, 39–40). As shown in our main brief (pp. 24–27), prior to the 1940 Act declaratory relief was not accorded to claimants residing abroad or seeking admission; habeas corpus was considered

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tory relief available to review deportation and exclusion orders under the 1952 Act, but with respect to such orders the statute did not contain any detailed, specialized, explicit review provision comparable to Section 360; in fact, the 1952 Act made no provision at all for judicial review.

to be the appropriate remedy and was the route actually pursued.

The argument is made (Appellee's Br., p. 20; *Amicus* Br. for the A.C.L.U., pp. 27–31) that at the Congressional hearings on the 1940 Act—before Section 503 was added to the bill (see Govt. Main Br. 28; fn. 9)—government spokesmen assumed that declaratory relief would be available under the Declaratory Judgment Act. But the hearings show, rather, that the chief witness for the immigration bar, the government witnesses, and the Congressmen were all very uncertain as to the existence of any such declaratory remedy. See Hearings before the House Committee on Immigration and Naturalization on H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 285–286, 290–291, 292–3.[*] And the formal comment of the Cabinet Committee carefully left open the question whether a citizenship-claimant abroad could take advantage of the Declaratory Judgment Act. See the quotation in the A.C.L.U. Brief, p. 26, and Hearings, *supra*, at p. 504.

It was for the very reason that the availability of declaratory relief was so uncertain, as pointed out in our main brief (pp. 28–29), that Section 503 was included in the 1940 Act. Congress desired, in view of the many new loss-of-nationality provisions, to assure citizenship claimants the declaratory relief which might not otherwise be available. In fulfill-

[*] The representative of the Immigration and Naturalization Service seems plainly to have assumed that only habeas corpus would be available. Hearings, *supra*, at pp. 292–3.

ment of that purpose to create a new remedy, the first sentence of Section 503 (Govt. Main Br. 5) affirmatively and expressly established a declaratory cause of action for *all* citizenship claimants, within or without the United States.[7] In addition, Section 503 established the certificate-of-identity procedure for those outside the country, but this supplementary provision serves to support the point we stress—that Congress created a self-contained special statutory procedure for declaratory relief for citizenship-claimants, in the place of any remedy that might then have existed in embryo in the Declaratory Judgment Act. Though Section 503 of the 1940 Act and Section 360 of the 1952 Act differ considerably in the remedies they provide, they are alike in establishing exclusive procedures for testing claims of United States nationality.[8]

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[7] Congress surely did not include this sentence in Section 503 solely to provide a venue in addition to that provided in the Declaratory Judgment Act—as appellee suggests (Appellee Br., p. 20).

We do not suggest that the Declaratory Judgment Act is or was unavailable to plaintiffs simply because they are overseas, but only that it was unavailable to test their *nationality* claims. It could, of course, be used to vindicate *other* rights and claims.

[8] Since the present case does not involve an overseas claimant who would not be eligible to apply for a certificate under Section 360(b)—*i.e.*, a claimant never physically present in the United States and over 16 years—we need not discuss the rights of such an individual. But it is appropriate to say that, if judicial relief is available, it would be because of the force of the Constitution, not because Congress intended to accord such a right.

B. THE LEGISLATIVE HISTORY OF SECTION 360 SHOWS THAT CONGRESS INTENDED TO REQUIRE NON-RESIDENT CLAIMANTS TO TEST THEIR NATIONALITY CLAIMS BY SEEKING ADMISSION TO THE COUNTRY

Section 360 was passed "with the evident intention of limiting the opportunity of persons claiming to be citizens to seek a judicial declaration of their rights". *Puig Jimenez* v. *Glover*, 255 F. 2d 54, 56 (C.A. 1). The persons whose opportunity was to be thus limited were non-residents like appellee.

1. As explained in our main brief (pp. 30*ff*), in the enactment of the 1952 Act Congress was concerned with the large number of overseas claimants—mainly of Chinese descent—whom it considered to have misused the liberal declaratory judgment and certificate-of-identity procedures of Section 503 of the 1940 Act. Appellee and the *amici* say that this concern was only with the certificate-of-identity system, not with the mere bringing of a declaratory action from abroad (see, *e.g.*, Appellee's Br. 20–22). But this was plainly not the case. The dominant forces in Congress thought that the declaratory action itself had been abused and should be eliminated for those not within the country. The basic initial report of the Senate Judiciary Committee on the new legislation flatly recommended that the provisions of Section 503 "be modified to limit the privilege [of bringing a declaratory action] to persons who are in the United States" (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 777), and provided no form of judicial relief at all for those abroad. If

physical entry under a certificate of identity had been the only focus of concern, the Committee obviously would not have confined the right of declaratory relief, in itself, to persons already in the country, but would have permitted a declaratory action to overseas claimants while forbidding their coming to the United States under a certificate of identity.

The fact is that the problem worrying the Congress was not only the possible disappearance of certificate-of-identity entrants into the general population, but also that declaratory actions, without appropriate advance investigation by the Immigration and Naturalization Service and the making of a record in which that agency participated, could and did lead to the presentation of fraudulent and unsupported claims difficult to detect and overcome in the normal type of declaratory judgment trial. In addition, there was concern "about the flooding of the courts by such declaratory judgment actions" (*Puig Jimenez* v. *Glover*, 255 F. 2d 54, 56 (C.A. 1)). See Govt. Main Br. 30–31.[9]

[9] Appellee (Br. 21–23) (as well as the *amici*) put misplaced stress on the use of the word "entry" in certain observations and reports while the measure was under consideration in Congress. A non-citizen who gains entrance into the country as a citizen, through a declaratory judgment based on fraudulent or inadequate evidence, is properly said "to gain entry into the United States where no such right existed". See S. Rep. No. 1515, 81st Cong., 2d Sess., p. 777. "Entry" can come as the ultimate result of a successful suit, as well as under the certificate-of-identity procedure. If appellee were to prevail in the present action, he would gain entry into the United States as a result of the judgment, although he did not obtain a certificate of identity or come to the country under the aegis of such a document.

The Senate Committee's proposal for limitation of declaratory relief to claimants in the United States was carried into its first bills, and thereafter the versions of the bill recommended by the Senate Committee or passed by the Senate restricted the declaratory action to such persons. Only the House versions extended the declaratory remedy to certain overseas claimants, and as we point out in our main brief (p. 36) the Conference Committee and the Congress clearly adopted the Senate version. From first to last, the Senate insisted that declaratory relief be available only to claimants within the United States, and the Senate's view prevailed.

2. Conversely, the Senate, and ultimately the Congress, did adopt the suggestion (now embodied in Sections 360(b) and 360(c)) made by the Deputy Attorney General that claimants abroad should be "required to apply for admission to the United States at a port of entry and go through the *usual screening, interrogation, and investigation*, applicable in the cases of other persons seeking admission to the United States, *so that the Immigration and Naturalization Service will have as complete a record as possible on each person entering* this country claiming to be a national thereof". Govt. Main Br. 33 (emphasis added).[10] In proposing a form of Section 360 almost identical with that finally adopted by Con-

[10] This recommendation of the Department of Justice, accepted by Congress, is a primary source of the suggestion in our main brief (pp. 39–43) that Congress was interested in obtaining as complete a record as possible, after Service investigation and inquiry.

gress, the Senate Committee characterized subsections (b) and (c) as *requiring* the determination of the nationality status of overseas claimants to "be made *in accordance with the normal immigration procedures.*" Govt. Main Br. 34 (emphasis added). Those procedures would include expert investigation and the making of a formal record at a hearing at which the claimant would be available. See Govt. Main Br. 42–43.

If appellee were right and a declaratory action could be brought by a person outside the United States, a conclusive determination of nationality would be made without the "usual screening, interrogation, and investigation" applicable to those seeking admission; without the Immigration and Naturalization Service being able to build "as complete a record as possible"; and without following "the normal immigration procedures." That result would run directly counter to the stated Congressional purpose.

3. Substantial arguments can, of course, be advanced why Congress could or should have been more liberal and less restrictive. But in interpreting Section 360 the controlling considerations are what was done by the Congress which considered and passed it, and the factors which moved that Congress to take the action it did. In effect, the Congress—rightly or wrongly dissatisfied with the experience under Section 503 of the 1940 Act—returned, so far as claimants abroad are concerned, to the situation (which had lasted for decades) when citizenship claimants outside

the country had to test their status by applying for admission and pursuing their judicial remedy in habeas corpus proceedings.

It was the legislative choice to return to pre-declaratory judgment days, but at the same time to facilitate the attempt to gain admission by continuing (in that context) the certificate-of-identity system established by Section 503 of the 1940 Act.[11] It may normally be harder on the claimant to follow the procedures of Sections 360(b) and 360(c) than it would be to bring a simple declaratory action like appellee's. But these difficulties are of the same order of magnitude as existed prior to 1940, and to a large extent are the same as those under the certificate procedure of the 1940 Act. Congress has not chosen novel procedures, more burdensome than others of the past. It has chosen, for reasons which seemed proper to it, to require a procedure well known in our past, even the recent past.

4. Finally, it bears noting that, while the 1952 Act was going through Congress, the provision which ultimately became Section 360 was regarded by opponents of the bill (including representatives of the Association of Immigration and Nationality Lawyers) as cutting off declaratory relief for claimants not specifically granted such a remedy by the section itself. See, e.g., Joint Hearings before the Subcommittees of

[11] With respect to persons in Mexico and Canada, the Department of Justice, with the concurrence of the Department of State, has adopted the policy that such individuals need not take the preliminary step of securing certificates of identity before making an entry application at the border.

the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., at pp. 106–108, 443–444, 527, 673. And President Truman, in vetoing the bill, stated that "Judicial review of administrative denials of citizenship would be severely limited and impeded in many cases, and completely eliminated in others". H. Doc. No. 520, 82d Cong., 2d Sess., p. 7 (veto message). We cite these remarks because they indicate that, on this aspect of the measure, its opponents agreed with its proponents as to the impact of the new legislation.

CONCLUSION

For these reasons and those stated in our main brief, it is respectfully submitted that the judgment below should be reversed.

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